

SANDLER, REIFF, YOUNG & LAMB, P.C.

September 27, 2013

Jeff S. Jordan, Esq.
Supervisory Attorney
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: **MUR 6748**
Respondents Hanabusa for Hawaii and
George S. Yamamoto, in his official capacity as treasurer

Dear Mr. Jordan:

I am writing on behalf of Hanabusa for Hawaii and George S. Yamamoto, in his official capacity as treasurer, (the "Campaign") in response to a complaint dated August 6, 2013 by Daniel G. Hempey that alleges violations of the Federal Election Campaign Act of 1971, as amended (the "Act").

Summary

The entire basis of the complaint is that a U.S. House of Representatives employee sent an introductory e-mail from his personal account to three people incorrectly asserting that "PhRMA has committed to pulling together an independent expenditure" on behalf of the Campaign and that he "came to the conclusion that it is the three of you" that they "should be in touch with."¹ None of the e-mail recipients, the Campaign, or any agents of the Campaign took any material action related to any independent expenditure communications. And, to the best of the Campaign's knowledge, PhRMA has not made any independent expenditure communications supporting the Campaign.

Nevertheless, Mr. Hempey, relying solely on this introductory e-mail, speculates that the Campaign is "actively coordinating with PhRMA on a corporate-paid advertising campaign"² and that agents of the Campaign are "soliciting and preparing to spend 'soft money' in violation"³ of the Act. Mr. Hempey does not claim to have any personal knowledge related to his allegations and he provides no evidence to support his allegations.

¹ June 28, 2013 e-mail from Christopher Raymond attached as Exhibit A.

² Complaint at 4

³ Complaint at 5

The evidence in this matter shows that, in fact, the Campaign has acted in full compliance with Federal election law. Specifically, (1) the Campaign and its agents did not request, or assent to any suggestion, that PhRMA make any independent expenditure communications; (2) to the best of our knowledge, PhRMA has not paid for any independent expenditure communications supporting the Campaign, and; (3) the Campaign, its agents, and Congresswoman Hanabusa did not solicit any non-Federal funds from PhRMA.

As discussed in detail below, there is absolutely no reason to believe a violation of the Act occurred and the complaint should be dismissed.

Factual and Legal Analysis

A. Factual Background

1. Hanabusa for Hawaii is the principal campaign committee for Congresswoman Colleen Hanabusa's 2014 campaign for U.S. Senate in Hawaii.
2. The Pharmaceutical Research and Manufacturers of America ("PhRMA") is a trade association. Nick Shipley and Bob Phillipone work for PhRMA.
3. On June 26, 2013, Congresswoman Hanabusa and Erica Slates (a fundraiser for the Campaign) met at a restaurant in Washington, D.C. for breakfast with Mr. Shipley and Mr. Phillipone. Christopher Raymond, a House staff person, was originally scheduled to attend the meeting but he was ill and could not attend. During the breakfast meeting, they had a general discussion about various issues related to Hawaii, public policy matters, and politics. They discussed the 2014 Hawaii U.S. Senate race in broad terms including speculation about who Senator Harry Reid would support. At the end of the breakfast meeting, one of the PhRMA representatives very briefly listed things that PhRMA has done in the past to support candidates such as, fundraising, making PAC contributions, and independent expenditures. Congresswoman Hanabusa and Ms. Slates listened but did not respond. No commitments were made by PhRMA to support the Campaign, to make a PAC contribution, or to make any communications. The parties exchanged pleasantries and the meeting ended.
4. At the June 26 meeting, several things did not happen: (a) no commitments were made by PhRMA representatives to support, contribute to, or to make any communications

supporting the Campaign; (b) Congresswoman Hanabusa and Ms. Slates did not request or suggest that PhRMA make independent expenditure communications supporting her campaign for U.S. Senate; (c) there was not substantial discussion with the PhRMA representatives about the Campaign's plans, projects, activities, or needs; and, (d) Congresswoman Hanabusa and Ms. Slates did not solicit or direct the spending of any non-federal funds in connection with an election for Federal office.⁴

5. After the June 26 breakfast meeting, Mr. Raymond, who did not attend the breakfast meeting, contacted Mr. Shipley to see how the meeting went from his perspective.

6. On June 28, 2013, Mr. Raymond sent an e-mail to Jennifer Sabas, Peter Boylan, and Rod Tanonaka summarizing his follow-up communication with Mr. Shipley. Ms. Sabas is a volunteer advisor to the Campaign. Mr. Boylan is the press secretary for the Campaign. Mr. Tanonaka is Congresswoman Hanabusa's chief of staff in her Congressional office.

7. In his June 28 introductory e-mail to Ms. Sabas, Mr. Boylan, and Mr. Tanonaka, Mr. Raymond provides his summary of his follow-up communication with Mr. Shipley:

As I'm sure you've heard, PhRMA has committed to pulling together an independent expenditure on CH's behalf. Nick Shipley (Government Relations VP) and Bob Phillipone (Senior VP) are the leads on this and would like to be put in touch with folks on the campaign. After having talked with Nick about this a little more, and based on our discussion, I came to the conclusion that it is the three of you the [sic] he would like to be in touch with. I am going to give him your email address so he can be in touch. I didn't feel comfortable giving out your phone numbers.

Should you be contacted by Nick or Bob please know they are good democrats. Let me know if you have any questions.⁵

8. Mr. Raymond was not authorized to act as an agent of the Campaign for any purpose related to any independent expenditure communications. Upon the Campaign's information, knowledge, and belief, Mr. Raymond did not have any substantive discussions with any person related to any allegedly-proposed independent expenditure communications at any time.

9. In August 2013, Mr. Raymond resigned from Congresswoman Hanabusa's official staff and he does not have a position on the Campaign.

⁴ See Declarations of Congresswoman Hanabusa and Erica Slates.

⁵ Exhibit A

10. Mr. Boylan did not take any material action related to allegedly-proposed PhRMA independent expenditure communications. Specifically, Mr. Boylan (a) did not request or suggest that PhRMA make independent expenditure communications supporting the Campaign; (b) he did not have a substantial discussion with any PhRMA representatives about the Campaign's plans, projects, activities, or needs; and, (c) he did not solicit or direct the spending of any non-federal funds in connection with an election for Federal office.⁶

9. In July, Mr. Shipley requested a meeting with Mr. Boylan but the meeting was never scheduled and did not happen.⁷

10. Ms. Sabas did not take any material action related to allegedly-proposed PhRMA independent expenditure communications. Specifically, Ms. Sabas (a) did not request or suggest that PhRMA make independent expenditure communications supporting the Campaign; (b) she did not have a substantial discussion with any PhRMA representatives about the Campaign's plans, projects, activities, or needs; and, (c) she did not solicit or direct the spending of any non-federal funds in connection with an election for Federal office.⁸

11. On or about July 26, 2013, Ms. Sabas met with a PhRMA representative to discuss a potential PAC fundraiser for the Campaign. No commitment was made by the PhRMA representative to Ms. Sabas and there was no discussion about independent expenditure communications.

12. Mr. Tanonaka did not take any material action related to allegedly-proposed PhRMA independent expenditure communications. Specifically, Ms. Tanonaka (a) did not request or suggest that PhRMA make independent expenditure communications supporting the Campaign; (b) he did not have a substantial discussion with Mr. Shipley, Mr. Phillipone, or any other agent of PhRMA about the Campaign's campaign plans, projects, activities, or needs; and, (c) he did not solicit or direct the spending of any non-federal funds in connection with an election for Federal office.

13. To the best of the Campaign's knowledge, information, and belief PhRMA has not paid for any independent expenditure communications supporting the Campaign.

⁶ Declaration of Peter Boylan

⁷ Declaration of Peter Boylan

⁸ Declaration of Jennifer Sabas

B. Legal Analysis

There are two legal issues in this matter: (1) did PhRMA make a prohibited coordinated communication as defined in 11 C.F.R. §§ 109.21 and 109.22, and (2) did Congresswoman Hanabusa, the Campaign, or any agent of the Campaign solicit or direct the spending of non-Federal funds in connection with an election for Federal office in violation of 2 U.S.C. §441i(e).

1. Coordination Analysis

Prohibited coordinated communications occur when a person makes expenditures for communications that result in excessive or prohibited-source in-kind contributions to a campaign committee. Expenditures made by any person in cooperation, consultation, or concert with, or at the request or suggestion of a candidate, candidate's authorized political committee, or agents, are a contribution to such candidate.⁹ When a person pays for a communication that is coordinated with a candidate or her authorized committee, the communication, is considered an in-kind contribution from the person to that candidate and is subject to the limits, prohibitions, and reporting requirements of the Act.¹⁰ A communication is coordinated with a candidate, authorized committee, or agent thereof if it meets a three-prong test set forth in the Commission's regulations: (1) it is paid for by a person other than the candidate or authorized committee; (2) it satisfies one of five content standards in 11 C.F.R. § 109.21 (c)¹¹; and (3) it satisfies one of six conduct standards in 11 C.F.R. § 109.21(d).¹² The six types of conduct that satisfy the coordination conduct standard are: (1) request or suggestion; (2) material involvement; (3) substantial discussion; (4) common vendor; (5) former employee; and (6) republication.

⁹ 2 U.S.C. §441a(a)(7)(B)

¹⁰ 11 C.F.R. § 109.21(b)

¹¹ The five content standards in 11 C.F.R. §109.21(c) are: (1) a communication that is an electioneering communication under 11 C.F.R. § 100.29 (communications that refer to a clearly identified federal candidate, publicly distributed within 60 days of a general election or 30 days of a primary election), and is targeted to the relevant electorate); (2) a public communication that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate or campaign committee; (3) a public communication that expressly advocates the election or defeat of a clearly identified candidate for Federal office; (4) a public communication that refers to a candidate for House or Senate and is publicly distributed in the candidate's jurisdiction 90 days or fewer before an election; or, (5) a public communication that is the functional equivalent of express advocacy.

¹² 11 C.F.R. § 109.21(a)

In this matter, *none* of the coordination prongs are satisfied. To the best of the Campaign's knowledge, PhRMA did not pay for any communications. Therefore, none of the communication content standards in 11 C.F.R. §109.21(c) are satisfied.

Even if there were communications, *none* of the coordination conduct standards in 11 C.F.R. § 109.21(d) were met, as evidenced by the declarations submitted with this response;

First, there was no request, suggestion, or assent to a suggestion for the creation, production, or distribution of a communication. The Campaign, the candidate, and any agents of the Campaign did not request or suggest that a communication be created, produced, or distributed and they did not assent to any suggestion that independent expenditures would be made supporting the Campaign. The PhRMA representatives did not make a commitment to do independent expenditures. They were briefly mentioned in a general list of things the PhRMA representative said were done in the past. The Campaign, the candidate, and the Campaign's agents did not even take any material action in response to the mention of independent expenditures.

Second, the Campaign, and its agents, were not materially involved in any decisions regarding: (1) the content of a communication; (2) the intended audience for the communication; (3) the means or mode of the communication; (4) the specific media outlet used for the communication; (5) the timing or frequency of the communication; or (6) the size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite.

Third, there was no substantial discussion between PhRMA and the Campaign about any communications. To the best of the Campaign's knowledge, PhRMA did not make any communications that satisfy the *content* standard required in 11 C.F.R. § 109.21(c). To satisfy the substantial discussion *conduct* standard, the communication must be created, produced, or distributed after one or more substantial discussions about the communication between the person paying for the communication, or the employees or agents of the person paying for the communication, and the candidate who is clearly identified in the communication, or the

candidate's authorized committee, or the candidate's opponent.¹³ A discussion is substantial if information about the candidate's campaign plans, projects, activities, or needs is conveyed to a person paying for the communication, and that information is material to the creation, production, or distribution of the communication.¹⁴ The declarations provided by Congresswoman Hanabusa, Ms. Slates, Mr. Boylan, Ms. Sabas, and Mr. Tananoka confirm that there were no substantial discussions with PhRMA representatives about any allegedly-proposed communications. The Campaign's plans, projects, activities or needs that could be material to the creation, production, or distribution of a communication *were not* conveyed to PhRMA.

Fourth, there was no common vendor used by the Campaign and PhRMA for communications. To the best of the Campaign's knowledge, PhRMA did not make any communications that satisfy the content standard required in 11 C.F.R. § 109.21(c).

Fifth, to the best of the Campaign's knowledge, there is no former employee or independent contractor of the Campaign currently employed by PhRMA who conveyed material information to PhRMA about any communications.

Sixth, to the best of the Campaign's knowledge, PhRMA has not made any communications that disseminated, distributed, or reproduced campaign materials prepared by the Campaign.

The Campaign, and any agents of the Campaign, did not engage in any of the necessary conduct activities described in 11 C.F.R. § 109.21(d).

There is no evidence that any of the coordination content or conduct prongs were met in this matter. Therefore, there is no reason to believe that any prohibited coordinated communications were made by PhRMA.

¹³ 11 C.F.R. § 109.21(d)(3)

¹⁴ 11 C.F.R. § 109.21(d)(3)

2. Solicitation Analysis

The second legal issue in this matter is whether Congresswoman Hanabusa, the Campaign, or any agent of the Campaign solicited or directed the spending of non-Federal funds in connection with an election for Federal office in violation of 2 U.S.C. §441i(e).

A candidate, an individual holding Federal office, agent of a candidate or an individual holding Federal office shall not solicit funds in connection with an election for Federal office unless the funds are subject to the limitations, prohibitions, and reporting requirements of the Act.¹⁵ The term *solicit* "means to ask, request, or recommend, explicitly or implicitly, that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value."¹⁶ A *solicitation* "is an oral or written communication that, construed as reasonably understood in the context in which it is made, contains a clear message asking, requesting, or recommending that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value."¹⁷

The complainant speculates that "by encouraging and collaborating with PhRMA on its corporate campaign expenditures, Representative Hanabusa's agents are soliciting and preparing to spend 'soft money' in violation of 2 U.S.C. § 441i(e)(1)."¹⁸ The complaint does not contain any evidence to support this allegation. Mr. Raymond's e-mail does not even mention any solicitation or attempts to solicit – it was simply an effort to put PhRMA representatives "in touch" with three individuals.

The declarations provided in this response confirm that the Congresswoman, the Campaign, and any agent of the Campaign did solicit non-Federal funds in connection with a Federal election. Therefore, there is no reason to believe that a prohibited solicitation occurred.

3. U.S. House of Representatives Matters

The complainant requests an investigation of matters that are not covered by the Act or within the Federal Election Commission's jurisdiction. True to form, he provided no evidence to

¹⁵ 2 U.S.C. § 441i(e)(1)

¹⁶ 11 C.F.R. § 300.2(m)

¹⁷ 11 C.F.R. § 300.2(m)

¹⁸ Complaint at 4.

support his assertion that an investigation is warranted. The Campaign and Congresswoman Hanabusa have acted in full compliance with the Rules of the U.S. House of Representatives. We respectfully request that the Commission deny his request for an investigation of matters outside the Commission's jurisdiction.

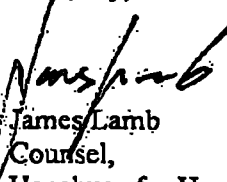
Conclusion

To the best of the Campaign's knowledge, information, and belief PhRMA did not make any communications that satisfy the content requirement in 11 C.F.R. 109.21(c). But even if such communications were paid for by PhRMA, the Campaign did not engage in any conduct required under 11 C.F.R. §109.21(d) for a finding of coordination.

The evidence and facts in this matter show that no prohibited coordinated communications were made by PhRMA and that no one made a prohibited solicitation of non-Federal funds in connection with a Federal election.

We respectfully request that the Commission find no reason to believe that the Campaign or the Campaign's treasurer, in his official capacity, violated the Act and that this matter be dismissed.

Sincerely,



James Lamb
Counsel,
Hanabusa for Hawaii and
George S. Yamamoto, Treasurer